No. 6866

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Pan American Petroleum Company, a corporation,
Libelant and Appellant,

vs.

Oil Screw Bergen, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc.,
Respondent,

Star and Crescent Boat Company,
Claimant and Appellee.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Brief for Appellee

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BRIEF FOR APPELLEE.

For the convenience of the court we preface this brief with a short statement of the essential facts in chronological order. For the most part these facts were stipulated to at the trial.

The Undisputed Facts.

The Oil Screw "Bergen", the respondent vessel, was owned by the appellee, Star and Crescent Boat Company, a corporation, whose principal place of business was at San Diego, California. On September 20, 1927, the vessel was sold by the appellee to John E. Heston, then engaged in the

fish business at San Pedro, California. To secure the payment of the balance of the purchase price amounting to the sum of $40,000.00 Heston, as a part of the transaction, executed a preferred mortgage on the vessel. (Rec. p. 41.)

Article III of said preferred mortgage provided as follows, (Rec. p. 25):

> "Neither the Mortgagor nor the Master of the Vessel shall have any right, power or authority to create, incur, or permit to be placed or imposed upon the property subject, or to become subject to this mortgage, any lien whatsoever other than for crew's wages, wages of stevedores and salvage."

On October 21, 1927, said preferred mortgage was duly recorded in the office of the Collector of Customs of the Port of Los Angeles. (Rec. p. 42.) This was the home port of said vessel and was also the residence of the owner of said vessel. (Rec. p. 42.) The record on file in the office of the Collector of Customs showed the name of the vessel, the parties to the mortgage, the time and date of the reception of the mortgage, the interest in the vessel mortgaged and the amount and date of the maturity of the mortgage in accordance with section 30, subsection 3, of the Act of June 5, 1920. (Rec. p. 42.)

The mortgage was endorsed upon the documents of the respondent vessel and contained the affidavit that the same was made in good faith and without design to hinder, delay or defraud any existing or future creditors of the mortgagor or any lienor of said vessel. (Rec. p. 42-43.)

All things necessary to entitle said mortgage to the status

of a preferred mortgage under the Ship Mortgage Act were done. (Rec. p. 43.)

A certified copy of the preferred mortgage was placed on board the respondent vessel and kept with the ship's documents. (Rec. p. 43.)

The "Bergen" was employed by Mr. Heston as a "tender" for the purpose of transporting supplies to a fleet of small fishing boats owned and operated by him off the coast of Lower California and in bringing back to San Pedro the catch of these small fishing boats. (Rec. p. 40 and p. 62.)

While so employed and during the months of September and October, 1928, the libelant, Pan American Petroleum Company, a corporation, furnished to the vessel gasoline and fuel oil upon the order of Heston, the total purchase price of which was $2,062.31. (Rec. p. 37.) Gasoline and diesel oil of the value of $1,287.61 was used by the "Bergen" and the balance thereof was delivered to the small fishing boats owned and operated by Mr. Heston in Turtle Bay. (Rec. p. 40.)

At the trial libelant waived any claim of lien for the gasoline and fuel oil delivered to the small fishing boats, conceding that no maritime lien upon the "Bergen" would result therefrom.

During the month of November, 1928, Mr. Heston defaulted in the payment of the installments of principal and interest provided for in the promissory note secured by the preferred mortgage. (Rec. p. 44.)

Thereafter, during the latter part of the year, 1928, and

the spring of 1929, several conversations were had between Mr. Heston and Capt. Hall, President of the appellee corporation, regarding the past due installments. An agreement was finally arrived at whereby in lieu of foreclosing the preferred mortgage the Star and Crescent Boat Company accepted a bill of sale of the "Bergen" from Mr. Heston and caused the preferred mortgage to be satisfied of record. (Rec. p. 44.) This agreement was consummated on or about May 1, 1929, by the recording of a satisfaction of the mortgage and a bill of sale from Mr. Heston to the appellee.

At the trial evidence was adduced by both libelant and claimant bearing upon the question of whether the Star and Crescent Boat Company had notice of the existence of libelant's claim of lien against the "Bergen" at the time it accepted from Mr. Heston a bill of sale of the vessel and caused the preferred mortgage to be satisfied of record. In this connection the trial court found as follows:

> "that it is not true that during said negotiations said claimant was advised by the said John E. Heston of the approximate amount and character of the claim of the libelant herein, or what specific materials and supplies were furnished to respondent vessel; nor is it true that the claimant was advised that the said Heston anticipated that libelant would take action against respondent vessel." (Rec. p. 55.)

The Specifications of Error.

An analysis of the specifications of error relied upon by the appellant, a statement of which appears at page 8 of appellant's brief, is next in order. Appellant relies upon Assignments of Error Numbered I to IX, inclusive. These

assignments appear in the record at pages 74 to 76. No reliance upon the Assignments of Error, Numbered X, XI, and XII is indicated and in accordance with the rules of this Court said assignments will be disregarded in this brief.

Assignments of Error Numbered I to VIII inclusive, may be collectively considered as they are all directed to the above quoted finding of fact made by the trial court and to the refusal of the trial court to grant appellant's requested findings in lieu thereof.

Assignment of Error Numbered IX is directed to the conclusion of law whereby the trial court found (Rec. p. 56), "That libelant acquired no lien against the respondent vessel, her engines, machinery, boilers, boats, tackle, apparel and furniture, etc."

Abstract of Appellant's Argument.

Appellant in its brief has made three points which in substance are as follows, (Appellant's Brief, pp. 9-10):

First: The appellee had either actual or constructive notice of appellant's claim at the time it accepted the conveyance of the vessel from Heston in satisfaction of the preferred mortgage.

Second: The preferred mortgage was merged in the conveyance and lost its priority over junior liens.

Third: Appellant obtained a lien upon the vessel subsequent to that of the appellee.

Logically, the third point made by appellant should first be determined, for, unless the appellant acquired at least a

junior lien as a result of the admitted delivery of supplies to the "Bergen" the argument need be pursued no further, and it matters not whether the mortgage later was merged in the conveyance, or whether appellee had notice of libelant's claim, if that claim did not constitute a lien. The existence of a lien is the very foundation of a proceeding *in rem,* and unless appellant acquired a lien in the first instance the decree of dismissal of the libel followed as a matter of course. However since libelant in its brief has adopted a different order of presentation we shall follow that order and consider appellant's points *seriatim.*

In fairness to this court, however, we wish to point out that the primary question presented upon this appeal is whether a lien was acquired by libelant, and if this court determines, as did the trial court, that no lien was acquired, then it need not consider the other points raised by appellant's brief and answered herein, for even if appellant's position upon the question of notice and merger were sound it would avail it nothing in the absence of a lien upon the vessel.

ABSTRACT OF ARGUMENT IN BEHALF OF THE APPELLEE.

On this appeal we make the following contentions:

I.

At No Time Prior to the Date it Received the Bill of Sale of the "Bergen" from Mr. Heston did the Appellee Have Actual or Constructive Notice of Appellant's Claim Against the Vessel, and the Finding to this Effect by the Trial Court is Fully Supported by the Evidence.

II.

The Preferred Mortgage Held by Appellee was at All Times a First Lien Upon the "Bergen" and Despite its Cancellation and the Acceptance by Appellee of a Conveyance No Merger Resulted.

III.

The Trial Court Correctly Concluded That the Libelant Acquired No Lien Whatever Upon the Respondent Vessel.

ARGUMENT.

I.

At No Time Prior to the Date it Received the Bill of Sale of the "Bergen" from Mr. Heston did the Appellee Have Actual or Constructive Notice of Appellant's Claim Against the Vessel, and the Finding to this Effect by the Trial Court is Fully Supported by the Evidence.

Although appellant contends that it "conclusively appears" from the record that appellee was "fully advised" of libelant's claim the trial court found otherwise, and this finding is amply supported by the evidence, which "conclusively" demonstrates the absence of notice.

There most certainly was nothing in evidence upon which appellant could possibly base a claim of constructive notice. It is provided in 46 U. S. C. A. 925, as follows:

> "(a) The collector of customs of the port of documentation shall upon the request of any person record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation and amount of the lien and the name and address of the person."

Libelant however caused no claim to be recorded. Had libelant seen fit to record its claim of lien instead of maintaining it in secrecy this litigation would doubtless have been avoided.

The evidence falls short of establishing actual notice. It is true that Mr. Heston testified upon direct examination that he told Captain Hall that he (Mr. Heston) "owed a large sum of money to the Pan American Petroleum Company." (Rec. p. 60); that he had considerable "accounts out which were against all his boats"; "that some of the account of the Pan American Petroleum Company was incurred by the 'Bergen'." However upon cross-examination he testified as follows, (Rec. p. 63):

> "Q. Now, precisely, if you know what did you say in that conversation, Mr. Heston?
> A. Why, I said there had been no liens filed.
> Q. There had been no liens?
> A. There had been no liens filed, and the fact that if I had a good spring season this year I could work out of all my difficulties and pay all the bills that I owed."

He further testified that he did not remember receiving a letter from the attorneys for the Star and Crescent Boat Company which contained the statement, (Rec. p. 63):

> "We have requested Mr. Chandler, before consummating the transaction, to ascertain whether or not the records show any liens or encumbrances subsequent to the mortgage. In the event that the existence of subsequent liens is indicated, the document should not be recorded until an adjustment is arranged with the lienholders."

Upon re-direct examination Mr. Heston was interrogated about his conversation with Mr. Chandler and testified, (Rec. p. 64) as follows:

> "Q. Was anything said at that time about any liens against the boat?
>
> A. The main part of the conversation was getting these documents recorded. As I recollect it, he said, 'You have got no bills out', and I said, 'Well, there is plenty of bills out, but there has been no liens—but there has been no liens filed against the boat. As far as the boat record is concerned, it is clear yet.' Of course, at this time I expected to work out of these difficulties.
>
> Q. When you say 'No liens filed', you mean no suits filed?
>
> A. There had been no suits filed, no.
>
> Q. Which did you say?
>
> A. I said there had been no suits filed or liens filed at that time. I thought a lien was a suit.
>
> Q. You thought a lien was a suit?
>
> A. Yes."

In contrast with the testimony of Mr. Heston, Captain Hall testified unequivocally and positively as follows:

> "* * * That it was in June or July, 1929, when he first learned that the Pan American Petroleum Company claimed a lien on the 'Bergen' for supplies furnished during the fall of 1928. That he could fix the date when he first learned of the claim of the Pan American Petroleum Company by referring to a letter from the Pan American Petroleum Company which was dated July 3, 1929. That prior to that time he had no knowledge of the existence of this claim. * * *" (Rec. p. 55.)

He further testified, (Rec. p. 65):

> "* * * That nothing was said at that time with reference to a claim against the 'Bergen' for fuel, oil or supplies. That he did not understand at that time that the Pan American Petroleum Company had any claim against the 'Bergen.' * * *"

He also said, (Rec. p. 66):

> "* * * That he did not know that there was any account held against the 'Bergen'. * * *"

And, (Rec. p. 66):

> "* * * That he had several later conversations with Mr. Heston with regard to making the past due payments on the boat, but that he did not remember anything being said about any claim of the Pan American Petroleum Company or others against the 'Bergen' in any of these conversations."

He further said, (Rec. p. 67):

> "* * * That when the claimant accepted back the bill of sale of the 'Bergen' and delivered the satisfaction of mortgage, it did not have any knowledge of the existence of the claims against the vessel at all. * * *"

Also he testified, (Rec. p. 69):

> "* * * That he requested Mr. Chandler in San Pedro to make investigations there to see if there were any bills. * * *"

In support of Captain Hall's oral testimony and corroborating it in all particulars is claimant's Exhibit "B", being a letter written by Captain Hall to Mr. R. J. Chandler, an

officer of the claimant, at Wilmington, dated April 4th, 1929, which reads, in part, as follows, (Rec. p. 67, 68):

> "I would like to make it very clear to you, in case we take title to the 'Bergen', without foreclosing our mortgage, if there should be any liens against the vessel in the way of repairs, supplies, or in fact, any liens whatever, we would be liable for them. I would ask that you be reasonably sure that there are no liens before having title to the vessel recorded in your name. If you think there are any such claims, the best way to do would be to foreclose on the mortgage."

Captain Hall stated, (Rec. p. 68):

> "* * * That he knew all the time that if they let the thing go through the regular channels and had foreclosed the mortgage and bid the vessel in, that there wouldn't be any liability for any claim coming back on them. * * *"

He explained that the mortgage was not foreclosed because his company wanted to convert the "Bergen" into a towboat which they needed immediately and that Mr. Heston had told him that it would reflect upon his credit and embarrass him if legal proceedings to foreclose the mortgage were commenced.

It is quite apparent, we believe, that Captain Hall would not have accepted the bill of sale of the "Bergen" in lieu of foreclosing the mortgage had he been "fully advised", as appellant contends, of its claim. There obviously would have been no reason for so doing.

The principles recently laid down by this Court in *The Mabel,* 61 Fed. (2nd) 537, would seem to be controlling in

support of the trial court's findings on this question. We quote from page 540 as follows:

> "In the case of *The San Rafael,* 141 F., 270, 275, Judge Ross, speaking for this court, said: 'It is well settled, said the Supreme Court in *Irving vs. The Hesper,* 122 U. S., 256, 266, 7 S. Ct., 1177, 30 L. Ed., 1175, "that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court. (Citing cases.)"'
>
> Having this principle in mind, we have reviewed the evidence in its entirety and concluded that it supports and justifies the finding and conclusions of the trial court. The testimony, consisting of that of approximately seventeen witnesses, taken in open court, is highly conflicting; and even if we were inclined to differ with the learned trial judge who saw the witnesses, heard their testimony, and had opportunity of passing upon their credibility and accuracy, we would not be warranted in interfering with his findings of fact and conclusions, 'unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law.' *Panama Mail S. S. Co. vs. Vargas* (C. C. A.) 33 F. (2d) 894, 895; *Id.,* 281 U. S., 670, 50 S. Ct., 448, 74 L. Ed., 1105; *The Lake Monroe* (C. C. A.) 271 F., 474.
>
> In the case of *Tomkins Cove Stone Co. vs. Bleakley Transp. Co.,* 40 F. (2d) 249, 252, the Circuit Court of Appeals for the Third Circuit said: 'Trying the case *de novo* from the printed record, our inclination is that the learned trial judge was right in holding the wharfinger free from negligence, but any lingering uncertainty in that regard must be resolved in favor of the fact finding of the trial judge (who saw and heard the witnesses) which will not be disturbed by an appellate court unless shown by the evidence to be clearly wrong. *American Merchant Marine Ins. Co. vs. Liberty S. &*

G. Co. (C. C. A.) 282 F. 514; *Lewis vs. Jones* (C. C. A.) 27 F. (2d) 72; *Swenson vs. Snare & Trist Co.*, (C. C. A.) 160 F., 459.'

In *Merchants' & Miners' Transp. Co. vs. Nova Scotia S. S. Corp.*, 40 F. (2nd) 167, 168, the Circuit Court of Appeals for the First Circuit said: 'His (the trial judge's) conclusions should be adopted by this court—in which an admiralty case is tried *de novo*—unless plainly wrong. *Lake Monroe* [(C. C. A.) 271 F., 474], *supra; The Parthian* (C. C. A. 48 F., 564; *The Alijandro* (C. C. A.) 56 F., 621; *Alaska Packers' Ass'n vs. Domenico et al.* (C. C. A.) 117 F., 99, 101.' "

II.

THE PREFERRED MORTGAGE HELD BY APPELLEE WAS AT ALL TIMES A FIRST LIEN UPON THE "BERGEN" AND DESPITE ITS CANCELLATION AND THE ACCEPTANCE BY APPELLEE OF A CONVEYANCE NO MERGER RESULTED.

Based entirely upon the assumption that appellee had notice of appellant's "outstanding junior lien", an assumption which we have shown is not supported by the evidence and is in direct conflict with the express finding of the trial court, appellant invokes the doctrine of merger and argues that appellee's preferred mortgage lost its priority as a lien upon the "Bergen". That no merger would result in the absence of knowledge of the "junior lien" by the senior lienholder is recognized in the cases cited in appellant's brief, and that the appellee had no knowledge has been demonstrated in the preceding section of this brief.

Furthermore, despite appellant's assertion that the contrary view is "well established, both in this country and

England" (Appellant's Brief, p. 14), the authorities with almost complete unanimity lay down the rule that the doctrine of merger will not operate unless it is shown affirmatively that the mortgagee desired that his title as mortgagee be merged in his title as owner.

The law is stated in Corpus Juris as follows:

> "* * * the mortgagee does not, by taking a transfer of the equity, lose his priority over subsequent judgement or mortgage liens, if it is his intention and interest to keep his own security alive for that purpose, unless, in the deed which he receives, he expressly assumes the payment of other liens on the property, in which case his undertaking may be enforced by the other claimants." (41 C. J., 773.)
>
> "* * * Furthermore, a merger will not be allowed where it would work injustice or violate well established principles of equity or the intention of the parties." (41 C. J., 775-776.)
>
> "The question of whether a conveyance of the equity to the mortgagee results in a merger of the mortgage and fee is primarily one of the intention of the mortgagee. The mortgagee has an election in equity to prevent a merger and keep the mortgage alive, which he may do for his own protection as against other liens or encumbrances, even though he does not indicate his intention for a long time after the conveyance of the equity to him and not until another is about to acquire from him an interest in one of the estates. * * *" (41 C. J., 776-777.)
>
> "A merger will not be held to result wherever a denial of a merger is necessary to protect the interests of the mortgagee, the presumption being, in the absence of proof to the contrary, that he intended what would best accord with his interests. *On this ground a merger has been denied even where the conveyance was admittedly made in satisfaction and cancellation of the in-*

debtedness, or where the mortgagee took the conveyance under the mistaken belief that a merger would result but with no desire or agreement on his part to bring it about." (41 C. J., 779.) (Italics ours.)

"Where necessary to enable the mortgagee to defend his rights under his mortgage against intervening liens of third persons, a merger will not be held to have resulted if his intention to that effect is shown, or if there is nothing to rebut the presumption that his intention corresponded with his interest; and so if he was ignorant of the existence of such intervening liens or encumbrances a merger will be prevented." (41 C. J., 780.)

In California the courts have repeatedly announced the principle that where there is an intervening lien it will be presumed as a matter of law that the mortgagee intended to keep the mortgage alive.

In 18 Cal. Jur., 76-77, it is said:

"* * * *Indeed, it is presumed as a matter of law that the party must have intended to keep on foot his mortgage title when it is essential to his security against an intervening title or for other purposes of security; and this presumption arises although the parties, through ignorance of such intervening title or through inadvertence, have actually discharged the mortgage and canceled the notes with the intention to extinguish them.*"

In *Hines vs. Ward,* 121 Cal., 115, plaintiff had a mortgage on the land of defendant Tunison. To prevent foreclosure costs Tunison asked the plaintiff to take a deed to the premises in satisfaction of the debt, which the plaintiff did without examination of the record. Plaintiff then surrendered and cancelled the note and satisfied the mortgage

of record. Defendant Richter, had previously recorded a judgment against Tunison. Plaintiff on learning of this brought an action asking that the satisfaction of the mortgage be cancelled and set aside and that he be restored to his rights thereunder and that the mortgage be foreclosed and the land sold. Mr. Justice Van Fleet, in delivering the unanimous opinion of the Supreme Court in bank, affirming the judgment awarding plaintiff the relief sought, said at pages 118, 119:

> "The contention of appellant is that the conveyance from Tunison had the effect to merge plaintiff's rights under the mortgage in the legal title carried by the deed, and relieve the land of the mortgage lien, thereby leaving it subject to the lien of appellant's judgment and liable to sale in satisfaction thereof.
>
> It is well established that equity will interpose to prevent a merger where from the circumstances it is apparent that it was not the intention of the grantee that a merger should take place; and where it appears to be for the interest of the grantee that there should be no merger of the lesser estate, such will be presumed to have been his intention. The rule is thus expressed by Mr. Jones: 'There is generally an advantage to the mortgagee in preserving his mortgage title; and, when there is, no merger takes place. It is a general rule, therefore, that the mortgagee's acquisition of the equity of redemption does not merge his legal estate as mortgagee so as to prevent his setting up his mortgage to defeat an intermediate title, such as a second mortgage or a subsequent lien, unless such appears to have been the intention of the parties and justice requires it; and such intention will not be presumed where the mortgagee's interest requires that the mortgage should remain in force. The intention is a question of fact.' (Jones on Mortgages, sec, 870.) And further:

'Even where the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and the mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest by reason of some intervening title or other cause that it should not be regarded as merged. *It is presumed as a matter of law that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title or for other purposes of security; and this presumption applies, although the parties through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes, and really intended to extinguish them.* * * * It may, therefore, be deduced from the authorities, as a general rule, that when the mortgagee acquires the equity of redemption in whatever way and whatever he does with his mortgage he will be regarded as holding the legal and equitable title separately, if his interest requires this severance. *The law presumes the intention to be in accordance with his real interest, whatever he may at the time have seemed to intend.'* (Jones on Mortgages, sec. 873.)"

It should be noted that the junior lien in *Hines vs. Ward* was recorded so that the plaintiff had constructive knowledge of its existence; that the plaintiff made no search of the records to discover if there were any liens; and that he satisfied the mortgage of record. Despite these facts no merger resulted and the mortgage lien was not destroyed.

In *Anglo-Californian Bank vs. Field,* 146 Cal., 644, action was brought to foreclose a mortgage executed to plaintiff by one Brandt, defendant Field's intestate. The defendant bank of Monterey filed a cross-complaint to foreclose its junior mortgage. After the suit was commenced defend-

ant Cowan bought from plaintiff the note and mortgage and later accepted a conveyance of the land from Brandt. The lower court foreclosed the mortgage of the bank of Monterey, as the first and only lien on the land, declaring that plaintiff and defendant Cowan were forever barred from asserting any claims. The Supreme Court reversed this decision, saying:

> "The court below erred in holding that the lien of the mortgage to plaintiff was extinguished and merged in the fee by the conveyance of the equity of redemption by Brandt to Cowan. The evidence on this subject is not conflicting, nor are the facts disputed. There is no evidence of the intention of Cowan to extinguish the lien of plaintiff's mortgage, except the inferences to be deduced from the assignment, in connection with the circumstances under which it was given and accepted, and the subsequent transactions between Cowan and Brandt. * * * Certainly these facts furnish no direct evidence of an intention to extinguish the first mortgage. The recitals and circumstances, in connection with the well-known rules of equity on the subject, imply an intention not to extinguish the lien, but, on the contrary, to keep it alive for the benefit of Cowan, the purchaser, as against the second mortgage. He did not assume the payment of either mortgage, nor undertake with Brandt that he would pay them. The recital that he should hold subject to both merely states the character which the law would give his holding if a third party had then held the Anglo-Californian Bank mortgage. When considered in connection with the fact that he himself then held that mortgage, the recital raises a strong presumption against any intention to extinguish it by virtue of the conveyance. The guaranty in the assignment that it was a first mortgage raises an equally strong presumption that there was no intention to extinguish the lien as against subsequent liens at the time

the assignment was made. It is true that, under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished. *But this rule is never applied* where there is an intervening lien on the property, which it is to the interest of the purchaser to keep on foot, and *where there is no evidence,* direct or circumstantial, *of an express intention to extinguish the first mortgage and hold subject only to the second.* In such a case the legal title and first-mortgage lien will be considered as separate interests whenever necessary for the protection of the just rights of the purchaser. The question was fully considered in *Davis vs. Randall,* 117 Cal., 12. The law on the subject is well stated in the *syllabus* to that case in these words: 'The merger of mortgage liens with the fee, upon both being united in the same person, is a question of intent; and *merger will not be implied where there is an intervening claim,* but equity will keep the legal title and the mortgagee's interests separate, though held by the same person, whenever necessary for the full protection of his just rights; and if, from all the circumstances, a merger would be disadvantageous to the party holding the fee, his intention that merger shall not result will be presumed and maintained, and equity will keep the liens alive for the purpose of doing justice.' (See, also, *Hines vs. Ward,* 121 Cal., 118; *Scrivner vs. Dietz,* 84 Cal., 298; *Brooks vs. Rice,* 56 Cal., 428; *Rumpp vs. Gerkens,* 59 Cal., 496; *Carpentier vs. Brenham,* 40 Cal., 221; *Henderson vs. Grammar,* 66 Cal., 335; *Wilson vs. White,* 84 Cal., 243; *Tolman vs. Smith,* 85 Cal., 289; *Shaffer vs. McCloskey,* 101 Cal., 580; Jones on Mortgages, secs. 870, 873.)

That a merger of the lien of the first mortgage would operate to the disadvantage of Cowan, there can be no question. If the merger is not allowed to take

> place he is, of course, bound to take subject to the second mortgage, but upon a sale he would be entitled to receive out of the proceeds all the money due on the first mortgage, or he could keep the property by paying only the excess it brings over the first mortgage, whereas, if there is a merger, he would be bound to pay the second mortgage in full in order to keep the property he bought, or obtain any of the proceeds of its sale." (Pages 652, 653, 654.)
>
> * * * * * * *
>
> "We therefore hold that the mortgage to plaintiff was not merged by Cowan's purchase of the fee after he bought the mortgage." (Page 655.)

On a second appeal, to the Supreme Court the above holding was re-stated in *Anglo-Californian Bank vs. Field,* 154 Cal., 513, at pages 514, 515.

Applying the principles announced in the foregoing cases to the facts shown by the record the conclusion that there was no merger necessarily follows.

III.

THE TRIAL COURT CORRECTLY CONCLUDED THAT THE LIBELANT ACQUIRED NO LIEN WHATEVER UPON THE RESPONDENT VESSEL.

(A) Libelant, in the Exercise of Reasonable Diligence, Could Have Ascertained that the Mortgagor was Without Authority to Bind the Vessel for the Preferred Mortgage was of Record at the Port Where the Supplies were Furnished and by the Express Terms Thereof the Mortgagor was Precluded from Incurring any Lien for Supplies.

The gasoline and diesel oil for which appellant claims a lien were furnished to the respondent vessel at its home

port and upon the order of Mr. Heston. Under the general maritime law, and in the absence of statute, no lien would have been acquired under these circumstances.

> *The Lottawana,* 21 Wall. 558, 22 L. Ed., 654;
> *The Valencia,* 165 U. S., 264, 17 S. Ct. 323, 41 L. Ed. 710;
> *Alaska & P. S. S. Co. vs. C. W. Chamberlain & Co.,* (C. C. A. 9th) 116 Fed., 600.

Libelant's right to a lien therefore depends upon statute. The applicable statute is section 30 of the Ship Mortgage Act of 1920, subsections P, Q, and R. (46 U. S. C. A. Secs. 971, 972, and 973.)

Subsection P of the Act (46 U. S. C. A. Sec. 971) confers a lien to any person furnishing supplies upon the order of the owner of the vessel and further provides that, "* * * it shall not be necessary to allege or prove that credit was given to the vessel." Subsection Q (46 U. S. C. A. Sec. 972) designates the persons presumed to have authority from the owner. Subsection R (46 U. S. C. A. Sec. 973) after providing that the officers and agents of a vessel, designated in the preceding section, shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice,* or by an agreed purchaser in possession of the vessel, goes on to provide as follows:

> "* * * but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person

> ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

These sections of the Ship Mortgage Act of 1920 were based upon the Maritime Lien Act of 1910. (Act of June 23, 1910, Chapter 373, 36 Stat. L. 605.) Section 3 of the Act of 1910 is identical with the above quoted portion of section 973 with the exception that the words "subsection Q, section 972" replace the words "section 2" and the word "chapter" replaces the word "Act".

It would seem clear, as held by the learned trial judge (50 Fed. 2nd 447) that the libelant in this case exercised no diligence whatsoever to ascertain whether Mr. Heston, the person ordering these supplies was authorized to bind the vessel therefor. Had any diligence been exercised libelant could easily have determined that the mortgagor had, as Judge McCormick says, "by his own agreement in the documented and recorded mortgage, precluded himself from making purchases that would operate to attach a lien against the ship or that would be effective in pledging the credit of the ship for the supplies."

Appellant, however, contends (Brief, p. 30) that the case of *Morse Dry Dock & Repair Co. vs. S. S. Northern Star,* 271 U. S., 552, 70 L. Ed., 1082, is conclusive to the contrary. It is here to be remarked that certain language contained in this decision is the sole authority which able counsel for libelant have been able to unearth in support of their claim of lien. It is therefore proper to analyze the case at some length.

The facts in the Northern Star case briefly stated are as follows: The Morse Dry Dock & Repair Co. filed a libel for repairs on the vessel which, at the time the repairs were furnished, was being operated by the American Star Line, Inc. The intervening petitioner held a preferred mortgage by assignment from the United States. The mortgage in question contained the following clause:

> "* * * the party of the first part (the mortgagor) has no right, power, nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

The preferred mortgage had not been endorsed upon the ship's papers at the time the repairs were furnished, as provided for by section 30 of the Ship Mortgage Act of 1920. In the opinion of the District Court (*The Northern Star,* 295 Fed., 366) it is held that the provision of the Ship Mortgage Act requiring endorsement of the mortgage upon the ship's papers by the Collector of Customs was directory and not mandatory and that the failure of the Collector to make the endorsement would not deprive the mortgage of its preferred status. It was further held that by virtue of the above quoted clause in the mortgage, the American Star Line was not authorized to bind the vessel for the repairs in question and that no lien, therefore, attached. The case was reversed by the Circuit Court of Appeals. *The Northern Star,* (C. C. A. 2nd), 7 Fed. (2nd) 505. The Circuit Court of Appeals holds that the libelant acquired a lien for the repairs but that such lien was secondary to that of the mortgage

which the court holds was nevertheless a preferred mortgage despite the failure of the Collector of Customs to endorse the same upon the ship's papers. At page 506 it is said: "It will be observed from the foregoing provision of the mortgage that the owner covenanted not to permit a *prior* lien to the mortgage." (Italics ours.) The decision of the Circuit Court of Appeals was in turn reversed by the Supreme Court. (*Morse Dry Dock & Repair Co. vs. S. S. Northern Star,* 271 U. S. 552, 46 S. C. 489, 70 L. Ed. 1082.) In the opinion of the Supreme Court (Mr. Justice McReynolds dissenting) it is held that the failure of the Collector of Customs to make the endorsement upon the ship's papers required by the Ship Mortgage Act prevented the mortgage from attaining a preferred status. The majority opinion, written by Mr. Justice Holmes also concludes that the libelant acquired no lien.

It was the opinion of the learned trial judge who tried this case that the decision of the Supreme Court in the "Northern Star" case was in no sense controlling of the case at bar. We submit that the trial judge was right in this conclusion.

In the first place the clause contained in the mortgage involved in the "Northern Star" case was entirely different than the clause involved in the case at bar. The language of the mortgage on the "Northern Star" did not purport to do more than prohibit the imposition of *prior* liens. The Circuit Court of Appeals says on page 506, "* * * it will be observed from the foregoing provision of the mortgage that the owner, covenanted not to permit a *prior* lien to the

mortgage." (Italics ours.) Mr. Justice Holmes who wrote the majority opinion of the Supreme Court says at 271 U. S. 554, "* * * still when supplies are ordered by the owner, the statute does not attempt to forbid a lien simply because the owner has contracted with a mortgagee not to give any *paramount security* on the ship. The most that such a contract can do is to postpone the claim of a party chargeable with notice of it to that of the mortgagee." (Italics ours.) In other words in the Northern Star Case the mortgage attempted to prohibit *prior* liens, or in the language of Mr. Justice Holmes, *paramount* liens. The mortgage here, on the other hand, prohibits the imposition of *"any lien whatsoever"* other than certain specified exceptions. Obviously since the clause before the court in the "Northern Star" case, by its express language, was construed as containing no inhibition against the creation of a subsequent lien the conclusion of the court that the Morse Dry Dock & Repair Co. obtained a lien upon the vessel necessarily followed, irrespective of whether the mortgage was a preferred mortgage or not. As Mr. Justice Holmes remarks, "on these facts we feel no doubt that the petitioner got a lien upon the ship as was assumed by the Circuit Court of Appeals." The Bergen mortgage not only limits the imposition of a *prior* lien but it expressly precludes the mortgagor from creating a lien *either prior or subsequent* to that of the mortgage.

In the second place, since the Supreme Court concluded that the mortgage on the "Northern Star" was not entitled to a preferred status by reason of the Collector's failure to endorse it upon the ship's papers, it became entirely unnecessary to determine whether or not the clause

in question was effective to postpone the lien of the repairman to that of the mortgagee for if the mortgage was but an ordinary maritime mortgage it is elementary that the lien thereof would be outranked by that of the repairman. The opinion of Mr. Justice Holmes definitely states the question before the Court at page 555, "so the question more precisely stated is whether the above mentioned covenants postponed the lien to the mortgage security as they would seem to do on the facts of the case but for the language of the statute that we shall quote." The court then quotes the requirements prescribed by the statute to give a mortgage a preferred status. There is, we believe, in this language implied recognition of the effectiveness of a clause attempting to postpone the lien claims of others to that of a mortgage providing that the mortgage is preferred. The conclusion of the Supreme Court in the Northern Star Case was that the mortgage was not preferred and not being preferred it clearly was ineffective to postpone the admitted lien of the repairman.

The dissent of Mr. Justice McReynolds is obviously predicated upon a construction of the clause in question different from that of the majority. In his dissenting opinion Mr. Justice McReynolds refers to the covenant in question as having "deprived the owner of both right and authority within the true intent of the statute to create the lien now claimed by the repair company." This construction of the clause in question, was adopted by the Circuit Court of Appeals of the Third Circuit in *The American Star,* 11 Fed. (2d) 479. Mr. Justice McReynolds regarded the language of the clause contained in the mortgage be-

fore the court as a prohibition against the incurring of any lien whatsoever which is of course the purport and effect of the clause here involved. So construing the clause in the "Northern Star" Case, the conclusion of Mr. Justice McReynolds that the petitioner acquired no lien would seem sound and his remark that the argument in support of such conclusion "cannot be vaporized by mere negation" would seem appropriate.

The Northern Star holds then nothing more than this, —that a covenant by a mortgagor contained in an ordinary mortgage, not to impose upon the vessel any liens *prior* to that of the mortgage will not have the effect of postponing the lien of a repairman which, under general maritime law, is prior. Nothing more than this is decided by the Supreme Court.

The Fact That the Mortgage in the Case at Bar was a Preferred Mortgage is Material.

Counsel for the appellant, however, contend that the fact that the mortgage in this case is conceded to have the status of a preferred mortgage under the Ship Mortgage Act, whereas the mortgage in the "Northern Star" Case was but an ordinary mortgage, is immaterial. (Appellant's Brief, p. 35.) There is, we submit, no merit whatsoever to this contention. Indeed the fact that the mortgage here involved attained the dignity of a preferred mortgage is one of the two distinguishing features between this case and the "Northern Star" case.

It is elementary that an ordinary ship mortgage in admiralty has no maritime incidents and that any maritime

lien takes precedence over the lien of an ordinary mortgage irrespective of whether the mortgage be prior or subsequent. Courts of admiralty have even denied themselves jurisdiction to foreclose an ordinary ship mortgage.

In the case of *The J. E. Rumbell,* 148 U. S., 1, 13 S. C., 498; 37 L. Ed., 345; Mr. Justice Gray, speaking for the court, said:

> "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it."

And in the early case of *The John Jay,* 17 How., 399; 15 L. Ed., 95, Justice Wayne, speaking for the court, said:

> "It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States."

And further on in the same opinion he said:

> It (a mortgage) "is a contract without any of the characteristics or attendants of a maritime loan," and, "has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction."

In the case of *The Buckhannon,* 299 Fed., 519, the Circuit Court of Appeals of the Second Circuit, speaking through Judge Hough says: (p. 521)

> "* * * She was a mortgaged vessel, but it is a point too familiar to need citation that the mere fact that

there is a mortgage, *and not a preferred mortgage,* upon a ship, does not in the least prevent or limit the right of her owner, or that owner's lawful agents, to pledge the credit of the vessel by the incurring of a maritime lien. This is because the maritime lien is superior to the mortgage and takes no cognizance of the mortgage as such." (Italics ours.)

"* * * Doubtless the claimant, as well as the rest of the world, was affected with knowledge of the mortgage by reason of its recording; but, as above pointed out, it is fundamental that the mere existence of this *unpreferred mortgage amounted to nothing so far as the creation of maritime liens was concerned.*" (Italics ours.)

And again at page 522:

"* * * Therefore this case becomes the ordinary one of the owner of a mortgaged vessel pledging its credit in such a manner as to create a maritime lien. That there is nothing in the mere existence of such *an unpreferred and non-maritime mortgage* to prevent the creation of a lien is not and cannot be seriously contested. * * *" (Italics ours.)

In the case of *The Ocean View,* Dist. Ct. Md., 21 Fed., (2d) 875, a libelant was asserting a lien for repairs and supplies furnished the steamer, "Ocean View." The intervening libelant held a mortgage upon the vessel. It was admitted that the mortgage did not comply with the provisions of the Ship Mortgage Act of June 5, 1920, and the question presented was whether the mortgage was entitled to any priority. The Court says: (p. 875)

"It is well settled that a mortgage, as generally understood, has no maritime incidents, and therefore is not a matter for admiralty jurisdiction, nor is it

brought within such jurisdiction by the mere fact that it happens to be placed upon a ship. *Bogart vs. The John Jay,* 17 How., 399; 15 L. Ed., 95; *Schuchardt vs. Babbidge,* 19 How., 239; 15 L. Ed., 625. See, also *Benedict on Admiralty* (5th Ed.) Par. 77. * * *"

Express recognition of the limitations of the doctrine of The Northern Star (*supra*) is indicated by the following portion of the learned District Judge's opinion:

> "Since the mortgage here under consideration does not comply with the act, it confers no maritime lien at all, and must take the status assigned to common-law liens, which are subsequent to all maritime claims. See *Morse Dry Dock Co. vs. The Northern Star,* 271 U. S., 552, 46 S. Ct., 489, 70 L. Ed., 1082. * * *"

The above language would seem to dispose absolutely of appellant's contention in this regard. Not only is the fact that the claimant's mortgage here attained the status of a preferred mortgage a material fact in this case, it is a decisive fact which distinguishes the case from The Northern Star.

Concerning the Decided Cases Involving Limitations Upon the Authority of Charterers and Purchasers on Conditional Sale.

Appellant's next contention at page 36 of its brief, is that cases involving limitations of the authority of charterers or purchasers under conditional sales contracts are not in point. There appears to be no substantial distinction between cases involving a clause prohibiting the incurring of liens in a charter-party or a contract of conditional sale, and cases wherein the same clause is contained

in a duly documented, preferred mortgage of record in the very port where the supplies upon which the claim of lien depends were furnished to the vessel. Neither reason nor authority supports the attempted distinction. It would seem anomalous to hold that the identical clause if embodied in a contract of conditional sale would have the effect of precluding the attachment of liens on the vessel but would not have that effect if embodied in a preferred mortgage.

In the leading case of *United States vs. Carver,* 260 U. S., 482; 43 S. Ct., 181; 67 L. Ed., 361, libels were filed for supplies furnished to the steamships Clio and Morganza, which were operated by the State Steamship Corporation under charters which contained a clause that "the charterers will not suffer nor permit to be continued any lien" etc. The opinion of the Supreme Court, written by Mr. Justice Holmes and concurred in by all the justices, first construed the clause there involved as intending to preclude the attachment of any lien. The Court says: "but the primary undertaking is that a lien shall not be imposed." It was held that libelants obtained no lien upon either vessel. The Court says, at page 488:

> "* * * The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien, and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualified the whole in Par. 3 as follows: 'But nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other neces-

saries was without authority to bind the vessel therefor.' "

The Court then goes on to say:

> "We regard these words as too plain for argument. They do not allow the materialman to rest upon presumptions until he is put upon inquiry,—they call upon him to inquire. To ascertain is to find out by investigation. If, by investigation with reasonable diligence the materialman could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if, in the same way, he could have found out its terms, he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910."

In *North Coast Stevedoring Co. vs. United States,* 17 Fed. (2d) 874, this court was presented with a case wherein the libelant and appellant asserted a maritime lien on the steamship Henry S. Grove, for stevedoring services. At the time the services were performed the vessel was operated under a conditional sales contract executed by the United States to the Atlantic, Gulf, & Pacific Steamship Corporation. The agreement for sale contained a clause providing that the purchaser should have no power or authority to suffer or permit to be imposed upon the vessel "any liens or claims which might be deemed superior to or a charge against the interest of the seller." It is to be noted that this clause likewise does not express such a clear limitation upon the authority of the purchaser to incur liens as does the clause in the case at bar. This is recognized by this court in its opinion at page 875 where it is stated:

> "While the prohibition against incurring liens is not as explicit as it might be, yet, when the agreement is construed as a whole, it leaves no doubt in the mind that it was the purpose and intent of the seller to protect the vessel against claims and liens that would have priority to, or preference over, the title of the government. * * *"

So construed this court held that the libelant acquired no lien whatever upon the vessel and accordingly the decree of dismissal was affirmed.

In *The Golden Gate*, 52 Fed. (2d) 397 the charter party did not forbid the creation of liens and accordingly this court applied the rule of *The South Coast,* 247 Fed., 84, which was later affirmed by the Supreme Court in *The South Coast,* 251 U. S., 519, 40 S. C., 233, 64 L. Ed., 386.

The S. W. Somers, 22 Fed., (2d) 448.

In this case a conditional sales agreement contained the following clause:

> "The buyer shall not suffer nor permit to be continued any lien or charge having priority, to or preference over the title of the seller in the vessel or any part thereof,"

It is to be noted that this clause is by no means as clear a prohibition against incurring of liens as is involved in the case at bar. Nevertheless the learned District Judge held that the repairman obtained no lien. After referring to a number of cases the learned judge says: (p. 449)

> "All of these decisions deal with supplies and repairs, and would seem to leave no doubt of the law,

> where they are furnished under conditions such as exist in the present case. There is no proof that any of the claimants has satisfied the rule of diligent inquiry imposed upon him by the act. * * *"

In *The Chester,* Dis. Ct. Md., 25 Fed. (2d) 908, various libels for repairs were asserted against the vessel, which, at the time the services were rendered, was under charter. This charter contained almost the identical language contained in the mortgage in this case, viz:

> "the said charterer and the said master and officers shall have no right, power or authority to create, incur or permit to be imposed upon said steamer any liens whatsoever, * * *"

Upon the authority of *United States vs. Carver, supra,* and *The S. W. Somers, supra,* the libel of the repairman was dismissed.

The Eureka, (Dist. Ct. Cal.) 209 Fed., 373.

In this case the Eureka was being operated under an option to purchase from the owner. This option was in writing and expressly provided that the operator should not incur any lien upon the vessel. The libelant furnished certain supplies to the vessel at her home port in San Francisco. In dismissing the libel Judge Dooling refers to the provisions of section 3 of the Act of June 23, 1910, and tersely remarks: "the Act upon which libelant relies defeats his right to a lien," and further says:

> "* * * yet by the exercise of the slightest diligence libelant could have ascertained that because of the terms of the agreement for sale of the vessel Capt.

Woodside was without authority to bind the vessel for any repairs or supplies."

In *United States vs. Robins Dry Dock & Repair Co.,* (C. C. A. 1st) 13 Fed. (2d) 808, the court says: (p. 812)

> "We are of the opinion that the sales agreement denied to the Elder Company the power to impose liens on ship or on freight moneys for supplies, stevedoring services, or repairs. The proofs show, we think, that under the rule of reasonable diligence laid down in *United States vs. Carver,* 260 U. S., 482, 43 S. Ct., 181, 67 L. Ed., 361, *supra,* none of the lienors in the instant case used such diligence. If the lienors had attempted to obtain accurate information, they could have readily found it from reliable sources by examining the ship's papers, or by inquiring of the Shipping Board, or of the Elder Company, to see the contracts under which the ship had been acquired and under which it was being operated. We think they were charged with knowledge of the terms of these agreements and that they did not acquire maritime liens upon the ship."

In the case of *The Roseway* (C. C. A. 2d) 34 Fed. (2d) 130, the libelant asserted a lien against the vessel for supplies. The vessel was under charter which expressly stated that the charterer would "not have the right to incur, nor will it allow to arise or attach any maritime lien." It was held that the libelant acquired no lien upon the vessel. In so holding the court quotes from the opinion in the case of *Morse Dry Dock & Repair Co. vs. United States,* 1 Fed. (2d) 283, as follows, (P. 132):

> "The facts were readily ascertainable; the inquiry into the facts was a duty under the statute, and when a

> duty to make inquiry exists, it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prudent man," and "that duty is not discharged by accepting the statement of an interested party without any examination of the title papers which would have disclosed a want of power to create a lien upon the property involved."

In the recent case of *The Olympia,* (Dist. Ct. Conn.) 58 Fed. (2d) 638, the court says with reference to the applicable provision of the Ship Mortgage Act, at page 642:

> "Under this statute, it is authoritatively established that no lien at all arises in favor of one furnishing repairs and supplies to a chartered vessel at the request of the charterer, where reasonable investigation would have disclosed that there was a charter which forbade such liens. *U. S. vs. Carver,* 260 U. S., 482, 43 S. Ct., 181, 67 L. Ed., 361; *The Roseway* (C. C. A.) 5 F. (2d) 131; *The Capitaine Faure* (D. C.) 5 F. (2d) 1008; *Id.* (C. C. A.) 5 F. (2d) 1009; *The Anna E. Morse* (C. C. A.) 286 F. 794; *Frey & Son vs. U. S.* (C. C. A.) 1 F. (2d) 963.
>
> It is impossible to find any basis for distinction between the rights of one furnishing to a charterer and one furnishing to a conditional vendee of the vessel. Indeed, the cases fully indicate that the rule applies where the repairs are ordered by a conditional vendee in possession. *North Coast Stevedoring Co. vs. U. S.* (C. C. A.) 17 F. (2d) 874; *U. S. vs. Robins Dry Dock Co.* (C. C. A.) 13 F. (2d) 808; *The S. W. Somers* (D. C.) 22 F. (2d) 448; *Morse Dry Dock Co. vs. U. S.* (D. C.) 298 F. 153; *Id.* 266 U. S. 620, 45 S. Ct. 99, 69 L. Ed. 472."

In connection with its contention that a lien was acquired appellant has advanced the suggestion that the clause in the

mortgage forbidding the mortgagor from incurring other than certain specified liens is invalid as a "clog upon the equity of redemption." (Appellant's Brief, p 36.)

No authority is cited in support of this proposition other than a statement from Pomeroy, Equity Jurisprudence the substance of which is that it is not competent for parties to a mortgage, by provisions therein, to alter or modify the statutory period of redemption or to attempt in derogation of the statute, to specify who may exercise the right of redemption. Obviously this is not in point.

CONCLUSION.

It is finally submitted that appellant acquired no lien whatever upon the respondent vessel since it failed to exercise the slightest diligence to ascertain whether the person ordering the supplies was authorized to bind the vessel. Of record in the very port where the supplies were furnished and attached to the ship's papers on board the vessel was the preferred mortgage wherein, in plain and unambiguous terms, Mr. Heston had precluded himself from incurring the lien now contended for. In no event, even if a lien were acquired by appellant, could that lien have outranked the admitted prior lien of the preferred mortgage. Nor was the priority of the preferred mortgage lost by the acceptance by the appellee of a conveyance of the vessel from the mortgagor since appellee had neither actual nor constructive notice of any claim against the vessel by libelant and since as a matter of law an intention against merger is presumed.

For the foregoing reasons the decree of the trial court should be affirmed.

Respectfully submitted,

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J. G. Driscoll, Jr.,

Proctors for Claimant and Appellee.